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Defendant *Pro Se*

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT

RAVALLI COUNTY

STATE OF MONTANA, Plaintiff, vs. HARRIS HIMES, Defendant.	)	Case No. DC 11-117 [Assigned to the Honorable Loren Tucker] **DEFENDANT'S OBJECTIONS TO PLAINTIFF'S EXHIBITS**

DEFENDANT HARRIS HIMES OBJECTS TO PLAINTIFF'S EXHIBITS AS FOLLOWS:

State's Exhibit 1:

Hearsay

Irrelevant as to any evidence of fraud or misrepresentation or any other charges.

State's Exhibit 2:

Hearsay

Irrelevant as to any evidence of fraud or misrepresentation or any other charges.

State's Exhibit 3:

Hearsay

Irrelevant as to any evidence of fraud or misrepresentation or any other charges.

State's Exhibit 4:

Hearsay

Irrelevant as to any evidence of fraud or misrepresentation or any other charges.

State's Exhibit 5:

Hearsay

Irrelevant as to any evidence of fraud or misrepresentation or any other charges.

Misstates the evidence in this case, particularly if the two attachments -- the letter of intent and the wiring instructions -- are not part of this exhibit, thereby rendering it incomplete and therefore irrelevant.

Irrelevant as to any evidence of fraud or misrepresentation or any other charges.

State's Exhibit 6:

Even though not requested, defendant waives any foundational objection concerning Ravalli County Bank -- no custodian of record will be necessary.

Otherwise, no objection.

State's Exhibit 7:

Hearsay, see discussion under Exhibit 8, infra.

Irrelevant as to any evidence of fraud or misrepresentation or any other charges.

State's Exhibit 8:

Irrelevant as to any evidence of fraud or misrepresentation or any other charges.

Hearsay:

Rule 801 provides that a statement offered against a party is not hearsay if it was made "by a coconspirator of a party during the course and in furtherance of the conspiracy." Rule 801(d)(2)(E), M.R.Evid. In order to admit Mr. Bryant's email correspondence under this rule, the State must show, by a preponderance of the evidence, the existence of the conspiracy itself *and* that the statements were made during the course

of the alleged conspiracy and in furtherance of it. *State v. Stever* (1987), 225 Mont. 336, 342, 732 P.2d 853, 857. Assuming for purposes of argument that the State can prove the requisite conspiracy—an agreement between Mr. Himes and Mr. Bryant to commit the charged offenses[1] —it will be unable to prove that statements made in the email satisfy the remaining requirements of the rule.

Recent Montana cases provide scant assistance in interpreting when a coconspirator's statement was made in the course and in furtherance of the conspiracy, but the Commission Comments on the adoption of Rule 801 state that this clause "is consistent with existing Montana law," citing a former statute providing that "'evidence may be given upon a trial of the following facts: ... After proof of the conspiracy, the act or declaration of a conspirator against his coconspirator and *relating to the conspiracy.*'" (Emphasis added.) The Comments also cite two Montana criminal cases that illustrate the parameters of admissibility. In *State v. Allen* (1906), the Court found testimony to be inadmissible hearsay when it relayed a conversation that occurred before the subject conspiracy was formed, remarking that, "to be admissible, the acts and declarations must have occurred during the life of the conspiracy; that is, after it has been formed and before its accomplishment or abandonment." By contrast, the same Court found admissible conversations that "all had *reference to the purpose of the conspiracy* and occurred" after the conspiracy agreement had been formed. 34 Mont. 403, 87 P. 177, 179-80 (emphasis added). In *State v. Collins* (1930), the Court similarly linked the duration and purpose of the conspiracy to admissibility, explaining that the principle

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[1]"A person commits the offense of conspiracy when, with the purpose that an offense be committed, the person agrees with another to the commission of that offense. A person may not be convicted of conspiracy to commit an offense unless an act in furtherance of the agreement has been committed by the person or by a coconspirator." §45-4-102(1).

applied to "declarations of a coconspirator made and done in furthering a conspiracy, then pending. . . ." 88 Mont. 514, 526, 294 P 957.[2] *See also State v. Francis*, 2001 MT 233, 307 Mont. 12, 15, 36 P.3d 390, 393, ¶ 11 (holding that "statements made after attainment of the conspiracy's object are not admissible unless the movant can prove an express agreement . . . to continue to act in concert to cover up the crime after its commission").

Applying these principles to the allegations of the Amended Information, it is clear that the statements embodied in the email correspondence were not made in the course of the conspiracy alleged and did not relate in any respect to commission of the offenses alleged.

The Amended Information identifies the acts Mr. Himes allegedly committed in furtherance of conspiracy to commit theft as "deceiving G.S. into investing in [Duratherm], and then accepting money from Pastor Bryant through the Monarch Beach Properties, LLC bank account." It alleges that he "had credit cards in his name paid off by the Monarch Beach account" and has failed to return G.S.'s money to G.S. These acts allegedly occurred "on or about March of 2008." Amended Information, Count V. Documents produced by the State indicate that G.S.'s payment was deposited into the Monarch Beach bank account in June of 2008. The State contends that these funds were disbursed from this account over the next six or seven months.[3]

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[2] The Commission Comment cited a third criminal case, *State v. DeWolfe*, (1904), which recited but did not discuss the principle that "evidence of what was said and done by defendant's co-conspirators must be confined to their acts and declarations made and done while the conspiracy was pending, and in furtherance of it." 29 Mont. 415, 419, 74 P 1084, 1088.

[3] An entity controlled by Mr. Serata, "Image of Truth," wired the sum of $150,000 to the Monarch Beach account at Harris Bank on June 6, 2008 (Bates 000064). On December 22, 2008, check number 2011, payable to Mr. Himes in the amount of $750, posted to the account

The email correspondence was sent several months after the alleged theft, which was accomplished when Mr. Serata's money was deposited to the Harris Bank account.

In short, none of the statements in the email refers or relates to the alleged plot to steal money from Mr. Serata or channel money from Monarch Beach to the Defendant.

The email correspondence also has no relevance or temporal nexus to the acts alleged in furtherance of conspiracy to commit fraudulent practices. The State alleges that Mr. Himes "ma[de] untrue statements or omit[ed] material facts when he failed to provide G.S. with complete disclosure information or a prospectus regarding G.S.'s investments in [Duratherm]," also in or about March of 2008. Amended Information, Count VI. These charges focus on what the Defendant did or did not tell Mr. Serata about Duratherm before he sent money to the Harris Bank account in June of 2008. The email correspondence occurred months after the investment, and could not have influenced it.

Again, none of the statements in the email refers or relates to the alleged agreement to induce Mr. Serata into investing in Duratherm without providing complete and accurate disclosures.

The inescapable conclusion is that Rule 801(d)(2)(E) does not exempt the statements in the email correspondence from the definition of hearsay. No exceptions would even potentially apply to the email correspondence.

Moreover, hearsay statements from Mr. Bryant, who is charged with the same crimes as Mr. Himes and, presumably, can be regarded as untrustworthy in the eyes of

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(Bates 747). This is one of the last disbursements that the State attributes to the Serata deposit. The State provided these documents to the Defendant in discovery, and they have been exhibits to other briefs filed in this case.

the State of Montana, also are inadmissible under the exclusion in Rule 803(8)(v) as "matter as to which the sources of information or other circumstances indicate lack of trustworthiness." *Cf. State v. Newman*(1973), 162 Mont. 450, 513 P.2d 258,262 (hearsay "rest[s] for its value upon the credibility of the out-of-court asserter").

State's Exhibit 9:

Hearsay

Speculation: "I will not try to imagine . . . ."

Paragraphs alleging any unfounded, irrelevant prior bad acts of Defendant (M.R.Evid. Rules 608, 609) beginning with the paragraph: "I am reminded of our early days . . . ," and concluding with the scripture reference of "Rev 21:8 (NET)," should be deleted/redacted if admitted.

Irrelevant as to any evidence of fraud or misrepresentation or any other charges.

Inflammatory.

State's Exhibit 10:

Irrelevant as to any evidence of fraud or misrepresentation or any other charges.

Hearsay

Inflammatory

Extortion: "I am ready to file criminal complaints . . . ."

State's Exhibit 11:

Hearsay

Lacks foundation

Irrelevant as to any evidence of fraud or misrepresentation or any other charges.

State's Exhibit 12:

Hearsay, see discussion under Exhibit 8, above.

Irrelevant as to any evidence of fraud or misrepresentation or any other charges.

For privacy reasons, the person named "Peanut" and her phone number should be deleted/redacted if admitted.

State's Exhibit 13:

Irrelevant as to any evidence of fraud or misrepresentation or any other charges.
Hearsay, see discussion under Exhibit 8, above.
Improper allegation/evidence of prior bad acts (M.R.Evid. Rules 608, 609)—this evidence was part of Count VII which was properly dismissed by this Court.
Inflammatory—being used purely to attack Defendant's character

State's Exhibit 14:

Hearsay:

Rule 801 provides that a statement offered against a party is not hearsay if it was made "by a coconspirator of a party during the course and in furtherance of the conspiracy." Rule 801(d)(2)(E), M.R.Evid. In order to admit Mr. Bryant's out-of-court statement listing Mr. Himes as a managing member of Monarch Beach under this rule, the State must show, by a preponderance of the evidence, the existence of the conspiracy itself *and* that the statements were made during the course of the alleged conspiracy and in furtherance of it. *State v. Stever* (1987), 225 Mont. 336, 342, 732 P.2d 853, 857. Assuming for purposes of argument that the State can prove the requisite conspiracy—an agreement between Mr. Himes and Mr. Bryant to commit the charged offenses[4] —it will be unable to prove that statements made in the Monarch Filings satisfy the remaining requirements of the rule.

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[4]"A person commits the offense of conspiracy when, with the purpose that an offense be committed, the person agrees with another to the commission of that offense. A person may not be convicted of conspiracy to commit an offense unless an act in furtherance of the agreement has been committed by the person or by a coconspirator." §45-4-102(1).

Recent Montana cases provide scant assistance in interpreting when a coconspirator's statement was made in the course and in furtherance of the conspiracy, but the Commission Comments on the adoption of Rule 801 state that this clause "is consistent with existing Montana law," citing a former statute providing that "'evidence may be given upon a trial of the following facts: ... After proof of the conspiracy, the act or declaration of a conspirator against his coconspirator and *relating to the conspiracy.*'" (Emphasis added.) The Comments also cite two Montana criminal cases that illustrate the parameters of admissibility. In *State v. Allen* (1906), the Court found testimony to be inadmissible hearsay when it relayed a conversation that occurred before the subject conspiracy was formed, remarking that, "to be admissible, the acts and declarations must have occurred during the life of the conspiracy; that is, after it has been formed and before its accomplishment or abandonment." By contrast, the same Court found admissible conversations that "all had *reference to the purpose of the conspiracy* and occurred" after the conspiracy agreement had been formed. 34 Mont. 403, 87 P. 177, 179-80 (emphasis added). In *State v. Collins* (1930), the Court similarly linked the duration and purpose of the conspiracy to admissibility, explaining that the principle applied to "declarations of a coconspirator made and done in furthering a conspiracy, then pending. . . ." 88 Mont. 514, 526, 294 P 957.[5] *See also State v. Francis*, 2001 MT 233, 307 Mont. 12, 15, 36 P.3d 390, 393, ¶ 11 (holding that "statements made after attainment of the conspiracy's object are not admissible unless the movant can prove an

[5] The Commission Comment cited a third criminal case, *State v. DeWolfe*, (1904), which recited but did not discuss the principle that "evidence of what was said and done by defendant's co-conspirators must be confined to their acts and declarations made and done while the conspiracy was pending, and in furtherance of it." 29 Mont. 415, 419, 74 P 1084, 1088.

express agreement . . . to continue to act in concert to cover up the crime after its commission").

Applying these principles to the allegations of the Amended Information, it is clear that the statements embodied in the Monarch Filings were not made in the course of the conspiracy alleged and did not relate in any respect to commission of the offenses alleged.

The Amended Information identifies the acts Mr. Himes allegedly committed in furtherance of conspiracy to commit theft as "deceiving G.S. into investing in [Duratherm], and then accepting money from Pastor Bryant through the Monarch Beach Properties, LLC bank account." It alleges that he "had credit cards in his name paid off by the Monarch Beach account" and has failed to return G.S.'s money to G.S. These acts allegedly occurred "on or about March of 2008." Amended Information, Count V. Documents produced by the State indicate that G.S.'s payment was deposited into the Monarch Beach bank account in June of 2008. The State contends that these funds were disbursed from this account over the next six or seven months.[6]

The first filings on record with the Nevada Secretary of State are the articles of organization and original list of managers and/or members of Monarch Beach, filed August 9, 2004. Bates 000795-798. Subsequent annual lists of managers or members were filed for each year from 2005 to 2011. *Id.*, Bates 000799-805. These lists merely repeated the list of members and managers from the original filing in 2004. It is

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[6]An entity controlled by Mr. Serata, "Image of Truth," wired the sum of $150,000 to the Monarch Beach account at Harris Bank on June 6, 2008 (Bates 000064). On December 22, 2008, check number 2011, payable to Mr. Himes in the amount of $750, posted to the account (Bates 747). This is one of the last disbursements that the State attributes to the Serata deposit. The State provided these documents to the Defendant in discovery, and they have been exhibits to other briefs filed in this case.

ludicrous to consider Mr. Bryant's listing of Mr. Himes on these documents for each year from 2004 to 2011 as "in the course and in furtherance of" an agreement to deceive G.S. into investing in a separate entity, Duratherm, in or about March of 2008.

The alleged connection between Mr. Himes and Monarch Beach also is immaterial to the allegations that the Defendant accepted money or credit card payments from the Monarch Beach account and failed to return money to G.S. The gravamen of the offense was that he took and kept money that did not rightfully belong to him. His alleged membership in or management of Monarch Beach does not tend to prove or disprove that he received funds and did not return them.

In short, none of the statements refers or relates to the alleged plot to steal money from Mr. Serata or channel money from Monarch Beach to the Defendant.

The Monarch Filings also have no relevance or temporal nexus to the acts alleged in furtherance of conspiracy to commit fraudulent practices. The State alleges that Mr. Himes "ma[de] untrue statements or omit[ed] material facts when he failed to provide G.S. with complete disclosure information or a prospectus regarding G.S.'s investments in [Duratherm]," also in or about March of 2008. Amended Information, Count VI. These charges focus on what the Defendant did or did not tell Mr. Serata about Duratherm before he sent money to the Harris Bank account in June of 2008. Mr. Bryant's statements in the Monarch Filings about the alleged membership and management of Monarch Beach beginning in 2004 have no bearing on disclosures concerning the operations, finances and prospects of the Duratherm business that Mr. Himes or Mr. Bryant allegedly were required to make before Mr. Serata invested his money.

Again, none of the statements refers or relates to the alleged agreement to induce Mr. Serata into investing in Duratherm without providing complete and accurate disclosures.

The inescapable conclusion is that Rule 801(d)(2)(E) does not exempt the statements in the Monarch Filings from the definition of hearsay. As the following section demonstrates, the Monarch Filings also do not fit within the only potentially applicable exception to the hearsay rule.

2. The Monarch Filings Are Not Excepted from the Hearsay Rule

The Monarch Filings are hearsay. As such, they are not admissible unless they fit into a recognized exception to the hearsay rule. Of the exceptions listed in Rules 803 and 804, the only one that conceivably could apply to these documents concerns public records and reports. Rule 803(8) allows admission of "records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law." Certain evidence that otherwise might fit into this exception is excluded from its scope, including "any matter as to which the sources of information or other circumstances indicate lack of trustworthiness." Rule 803(8)(v).

The Monarch Filings do not fit within the exception, both because they do not satisfy the requirements in the body of the exception and because, even if they did, the source of the information in them indicates lack of trustworthiness.

In interpreting rules of evidence, as in interpreting statutes, the role of the court is "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." §1-2-101, M.C.A., quoted in *Faulconbridge v. State*, 2006 MT 198, 333 Mont. 186, 142 P.3d 777, ¶ 56 (construing Rule 615(2), M.R.Evid.). When an issue can be resolved "on the plain language of" the rule in question, no further inquiry is necessary. *Associated Press v. Montana Sen. Republican Caucus*, 286 Mont. 172, 178, 951 P.2d 65, 68-69 (1997) (construing rule of civil procedure).

The exception in question refers to material that sets forth "the regularly conducted and regularly recorded activities" of the public agency, "matters observed pursuant to duty imposed by law and as to which there was a duty to report," or "factual findings resulting from an investigation." The Monarch Filings do not record activities of the Nevada Secretary of State, matters observed by anyone in that office or the results of any investigation by that office. The Nevada Secretary of State may have the duty to record business documents that it receives from members of the public, but there is no indication that it takes any steps to verify information that it receives. The Secretary of State could only certify that the Monarch Filings were accurate copies of documents filed with the office. Bates 000795.

Records that a public agency receives from a third party, and does not generate itself, do not possess the qualities that justify the exception in the first place. The Commission Comments to Rule 803 explain that "the guarantee of trustworthiness of this exception can be found partly under Exception (6). . . ." The Comments to Rule 803(6) explain that the guarantee of trustworthiness of records kept in the course of a regularly

conducted business activity "is provided by the nature of the record and the circumstances of preparation, enhanced by 'systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.'"

Thus, one can trust that the Nevada Secretary of State actually received the Monarch Filings, that they are true copies of the documents received, and that the date stamped on each document actually is the date of receipt and filing. One can presume that the employees of that office are trained to record the date of filing accurately and maintain true copies of the documents filed, and that procedures are in place to ensure that the employees fulfill these duties properly. The Monarch Filings would be admissible under this exception to show that the documents actually were filed with the Nevada Secretary of State—if that fact had any relevance to this case, which it does not.

Records delivered to the Secretary of State for filing cannot, however, be trusted to represent accurately that persons named as managers or members of a limited liability company really are the managers or members. The statements that Mr. Bryant made in the Monarch Filings bear none of the "guarantees of trustworthiness" of business or public records. They are hearsay within hearsay, and were not made in the course of any regularly conducted activity of the Secretary of State. *See Bean v. Mont. Bd. of Labor Appeals*, 1998 MT 222, 290 Mont. 496, 965 P.2d 256, ¶ 24 (even if document "qualified as a business record, it still would be inadmissible because [it] contained the hearsay statement of . . . a third party who was not charged with accurately reporting events" to the business).

Moreover, hearsay statements from Mr. Bryant, who is charged with the same crimes as Mr. Himes and, presumably, can be regarded as untrustworthy in the eyes of the State of Montana, also are inadmissible under the exclusion in Rule 803(8)(v) as "matter as to which the sources of information or other circumstances indicate lack of trustworthiness." *Cf. State v. Newman* (1973), 162 Mont. 450, 513 P.2d 258,262 (hearsay "rest[s] for its value upon the credibility of the out-of-court asserter"). A glaring example of the lack of trustworthiness of his listing of members of Monarch Beach in the Monarch Filings is the omission of his wife, relatives and others who allegedly own interests in Monarch Beach according to his email correspondence with Mr. Serata.

Rule 803(6) "requires the entity *creating* the business record—not the entity *receiving* it—to establish that the record was prepared in accordance with its regular and trustworthy business practices." *State v. Baze*, 2011 MT 52, 359 Mont. 411,251 P.3d 122, ¶ 19 (emphasis in original). Rule 803(8) relies on the same principles, and compels the same result. The Monarch Filings cannot be admitted under this exception to the hearsay rule.

State's Exhibit 15:

Irrelevant as to any charges.

State's Exhibit 16:

Irrelevant as to any charges.

State's Exhibit 17:

Lacks foundation as to the authenticity of the signatures

State's Exhibit 18:

Hearsay, see discussion under Exhibit 14, above.

State's Exhibit 19:

Irrelevant as to any charges.

State's Exhibit 20:

Irrelevant as to any charges.

Misleading if it is intended to be a confession made by Defendant

It has been stipulated by Defendant that it will not be necessary for Peter Christian to authenticate, with the proviso that the entire segment will be offered/brought into evidence if any part is.

State's Exhibit 21:

Lacks foundation

Misstates the evidence

Requires expert opinion, and Ms. Egan—by Court order—cannot be offered as an expert.

Irrelevant as to any charges.

State's Exhibit 22:

Although Defendant has not seen the actual exhibit, his understanding is that all it is to be used for is a statement of Defendant's address made by Defendant in an email to the Court. Defendant complied with the State's request to add a late exhibit and will offer no objection if it is used as represented. Defendant will also not require the attendance of Ms. Emily May to verify receipt of his email.

Dated: September 8, 2013

Harris Himes, Defendant *Pro Se*

CERTIFICATION OF SERVICE

On September 8, 2013, I e-mailed the following, with a signed and certified hard copy of the Defendant's Objections to Plaintiff's Exhibits to follow by First Class, US Mail on September 9, 2013, to:

Jesse Laslovich
Brett O'Neil
Special Deputy Ravalli County Attorneys
Special Assistant Montana Attorneys General
Office of the Commissioner of Securities and Insurance
Montana State Auditor
840 Helena Avenue
Helena, MT 59601

Hon. Loren Tucker
5th Judicial District Court
2 S. Pacific #6
Dillon, MT 59725

Dated: September 8, 2013

Harris Himes, Defendant *Pro Se*